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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GARY GRAHAM, now known as SHAKA SANKOFA,
Petitioner,

v.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF FOUR INNOCENT FORMER DEATH ROW INMATES AND THE NATIONAL CENTER ON WRONGFUL CONVICTIONS AND THE DEATH PENALTY AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICI

The *amici* supporting the grant of certiorari in this case are four ordinary citizens who were wrongly convicted of murder and sentenced to death. They are joined by the National Center on Wrongful Convictions and the Death Penalty, an institute of the Northwestern University School of Law and Northwestern Univeristy's Medill School of Journalism, devoted to documentation and education concerning the causes and cures of miscarriages of justice in capital cases.[1]

Amici believe that understanding the real-world obstacles that innocent death row inmates have faced in attempting to secure vindication through post-conviction proceedings is essential to comprehending the magnitude of the errors committed by the Court of Appeals.

The Fifth Circuit did not merely reach conclusions on the key legal issues that are squarely contrary to those of other Circuits. It came to a result that, unless reversed, threatens to close retrospectively and permanently the narrow gateway through which *amici* were able to struggle in order to prove their innocence. The decision below unfairly snatches from those who face execution notwithstanding strong evidence of innocence the protections carefully crafted by this Court to balance the claims of finality against the imperative need to avert fundamental miscarriages of justice. See *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995).

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[1]All parties have given their written consent to the filing of the brief, which have been filed with the Clerk of this Court. No counsel for either party authored this brief in whole or part, and no person or entity other than the *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Kirk Bloodsworth is a resident of Maryland. In 1984, he was wrongly convicted on the basis of several eye-witnesses of the murder, rape and first degree sexual offense of 9-year-old Dawn Hamilton, and sentenced to death. After these convictions were overturned because of the prosecution's failure to disclose investigative reports that implicated another suspect (see *Bloodsworth v. State*, 512 A.2d 1056 (Md. 1986)), Mr. Bloodsworth was again tried and convicted for these crimes and given three consecutive life sentences. See *Bloodsworth v. State*, 543 A.2d 382 (Md. App. 1988). After spending almost nine years in prison, Mr. Bloodsworth was released after sophisticated DNA testing proved conclusively that he was innocent of the crime. See Paul Valentine, *Jailed for Murder, Freed by DNA*, WASH. POST, June 29, 1993, at A1.

Clarence Lee Brandley, an African-American resident of Texas, was wrongly convicted of capital murder and sentenced to death in January, 1981 (a few months before Graham's conviction there) for the death of sixteen-year-old Cheryl Ferguson, a white female. See *Brandley v. State*, 691 S.W.2d 699 (Tex. Cr. App. 1985). After years of investigation, Brandley's volunteer attorneys and investigators showed that the conviction resulted from the state prosecutors' suppression of material exculpatory facts, knowing presentation of false evidence, and the state investigators' use of physical threats and racially-biased investigative procedures. In 1989, Brandley's conviction was overturned and he was released from prison the following year. See *Ex Parte Brandley*, 781 S.W.2d 886 (Tex.Cr.App. 1989); Nick Davies, WHITE LIES: RAPE, MURDER AND JUSTICE TEXAS STYLE 399 (1991).

Joseph Green Brown is a resident of Maryland. In 1974, he was wrongly convicted of rape, robbery and capital murder and sentenced to death in Florida, principally on the basis of the testimony of one witness. See *Brown v. State*, 381 So. 2d 690 (Fla. 1980). After he had come within 13 hours of execution, he and his attorneys showed that his conviction was based largely upon

testimony that was known by the prosecutor to be false, and his conviction was vacated in federal habeas corpus. See *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986). Mr. Brown was released from prison in 1987, having served almost fourteen years on Death Row. See Barry Siegel, *Sentencing the Wrong Man to Die*, , L.A. TIMES, May 10, 1987, at 1.

Walter McMillian is an African-American resident of Alabama. After a perfunctory two-day trial in 1988, he was wrongly convicted and sentenced to death for the murder of Rhonda Morrison, a white woman. As a result of four years of determined investigation by volunteer counsel, several new credible defense witnesses were located and the three essential state witnesses admitted that their trial testimony was false and had been procured by state investigators through previously undisclosed promises of lenient treatment and reward money. In 1993, Mr. McMillian was released from prison after state officials conceded his innocence. See *McMillian v. State*, 616 So.2d 933 (Ala. Cr. App. 1993); Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at A1; Pete Earley, CIRCUMSTANTIAL EVIDENCE (Bantam 1995).

The National Center on Wrongful Convictions and the Death Penalty is an institute of the Northwestern University School of Law and Northwestern University's Medill School of Journalism. The Center has identified and documented 81 cases during the past 25 years in which persons who were once condemned to die have been exonerated and freed. The Center works with many of these former death row inmates to call attention to the significant risk of wrongful execution and to urge courts and legislators to ensure that meaningful opportunities for exoneration are made available to guard against the execution of the innocent.

Kirk Bloodsworth, Clarence Lee Brandley, Joseph Green Brown, Walter McMillian, and the National Center on Wrongful

Convictions and the Death Penalty are uniquely familiar with the barriers confronting a wrongly-convicted citizen on death row who attempts to demonstrate his or her innocence in post-conviction proceedings.

SUMMARY OF ARGUMENT

A capital defendant "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). During the period of relevance here, however, the quality of legal representation provided to capital defendants was all too often deficient.

In this context, the Court developed a "miscarriage of justice" jurisprudence that enabled federal habeas corpus petitioners to gain relief from the errors of their lawyers by showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986); accord *Schlup*, 513 U.S. at 326 (applying this standard to allow petitioner to pursue a successive petition attacking failure of his trial counsel to call witnesses to establish his innocence).

This body of law constituted the fundamental protection against execution of innocent defendants until, in *McFarland v. Scott*, 512 U.S. 849 (1994), added another significant protection by giving a robust reading to the statutory right to counsel for federal habeas corpus petitioners contained in 21 U.S.C. § 848(q)(4)(B).

At that point, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA). In that Act, Congress sought to create a balance. On the one hand, it rejected a proposal to weaken Section 848. On the other hand, Congress imposed stringent new conditions on successive petitions, fundamentally

altering the structural mechanisms through which innocence was to be vindicated.

The decision below wrongly applies this latter change retroactively, to prisoners who were attempting to pursue their legal rights in an environment which often afforded no meaningful access to lawyers who would perform with "due diligence." In so holding, the Court of Appeals ignored the canons of statutory construction laid out by this Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) – principles that should have been applied to reject a retrospective application of the AEDPA. The Court of Appeals then compounded this error by adding the impossible condition (rejected by other Circuits) that the petitioner show he had relied upon prior law.

Although the evidence clearing some of the individual *amici* submitting this brief could have been found by diligent counsel at an early stage of the proceedings, it was not unearthed by their actual counsel until many years after trial. Fortunately, however, the *amici* had the benefits of a legal system that afforded them the opportunity to have their claims and evidence of innocence evaluated on their merits. Gary Graham deserves the same benefits.

ARGUMENT

I. UNDER THE PRE-AEDPA LEGAL FRAMEWORK, THE "MISCARRIAGE OF JUSTICE" DOCTRINE WAS CENTRAL TO VINDICATING THE CONSTITUTIONAL RIGHTS OF INNOCENT CAPITAL PRISONERS.

As the Petition for Certiorari lays out in detail (Pet. at 7-10), diligent trial counsel for Mr. Graham could – on the basis of information then available to be found – have so significantly undermined the government's case that a fully-informed jury

would have been most unlikely to return a conviction. But, like many of the *amici* and many of the 77 others who have been wrongly condemned, Mr. Graham did not have diligent trial counsel. This can happen, despite the best efforts of any system to ensure effective representation. In order to avoid visiting the possibly fatal consequences of such poor representation on innocent defendants, this Court crafted the doctrine of miscarriage of justice.

Prior to the passage of AEDPA, to be relieved by a federal habeas court of a procedural default committed at the state level, or to be permitted to file a successive federal petition (see *McCleskey v. Zant*, 499 U.S. 467, 493-95 (1991)), the petitioner was required to show either:

> (a) "cause" for the default or failure to plead the claim earlier and "prejudice" from the constitutional violation, or
>
> (b) a fundamental miscarriage of justice, *viz.* that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496.

The first of these conditions frequently could not be satisfied, even when counsel had been ineffectual in investigating the client's case. As *Murray v. Carrier* held, attorney error is "cause" only when it amounts to "ineffectiveness" under *Strickland v. Washington*, 466 U.S. 668 (1984), a test that is often difficult to satisfy. See *Murray*, 477 U.S. at 487. See generally, Stephen Bright, *Death in Texas*, THE CHAMPION, July 1999 at 16.

Thus, the miscarriage of justice doctrine, elaborated in a series of cases by this Court (see *Schlup* 513 U.S. at 320-21), played an absolutely vital role in insuring that death row inmates with strong cases of innocence could obtain rulings on the merits of their constitutional claims.

This case illustrates the point. When the federal District Court dealt with Graham's second habeas petition in 1993, it ruled that his attack on the effectiveness of trial counsel was successive to a similar claim Graham had asserted in his 1988 federal petition. Nonetheless, the District Court considered Graham's petition on its merits because the court held that Graham arguably had made out a colorable showing of factual innocence. *Graham v. Collins*, 829 F. Supp. 204, 208 (S.D. Tex. 1993). Addressing the merits, the District Court concluded that counsel had not been ineffective. That was the issue before the Fifth Circuit when (notwithstanding the state's explicit waiver of an exhaustion defense, it suddenly and spontaneously decided to send him back to the Texas courts to exhaust the claim "without prejudice." *Graham v. Johnson*, 94 F.3d 958, 971 (5th Cir. 1996); see also *id.* at 966 & n.13.

At that moment, Graham -- because he had made a colorable showing of actual innocence -- was entitled to a review of the constitutional merits of his successor petition. The Fifth Circuit's ruling in 1999 wrongly deprived him of that entitlement.

II. IN MISCONSTRUING AEDPA TO APPLY TO THIS CASE, THE FIFTH CIRCUIT MISREAD THIS COURT'S GOVERNING PRECEDENT, CONGRESSIONAL INTENT, THE APPLICABLE PRINCIPLES OF STATUTORY CONSTRUCTION, AND THE REQUIREMENTS OF JUSTICE.

In depriving Mr. Graham of his fully-matured right to a ruling on the merits of his claims, the Fifth Circuit first construed AEDPA to apply to this case, and then read the statute in a way that is not only legally unique, but uniquely unjust. Graham's counsel has already canvassed the many legal infirmities of that reading and the Circuit splits it creates (Questions 1-3). We confine ourselves to matters of special practical importance to innocent capital inmates.

A. The Fifth Circuit Flouted *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), in a Context that Most Urgently Calls for its Application

Ignoring the plain teachings of Chief Justice Rehnquist's opinion for seven members of the Court in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S. Ct. 1618, 1621 (1998), the Court of Appeals held that Graham's current petition was barred by the successive claim provision of AEDPA. The Court of Appeals reached this conclusion even though Graham's prior petition had been dismissed on exhaustion grounds. From *amici's* viewpoint, the critical similarity between Graham's case and *Martinez-Villareal* is not only in the law, but in the facts.

Martinez-Villareal took every possible step prior to AEDPA to press his claim, and was denied adjudication of his claim at that time only because the federal court determined that it would not hear the claim until after state court fact-finding to consider subsequent developments. See . *Martinez-Villareal*, 118 S. Ct. at 1620.[2] Similarly, Graham, beginning long before AEDPA came into force or was even contemplated, asserted his right to a disposition on the merits. Yet, even though he fulfilled the necessary legal requirements in 1993, Graham was blocked from having his case considered on its merits at that time simply because the Fifth Circuit spontaneously made a discretionary decision in 1996 to have further factfinding proceedings conducted in state rather than federal court.

When this Court examined Martinez-Villareal's situation, it held that his claim was not governed by AEDPA's bar on successive claims, writing:

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[2]Significantly, as in this case, the last federal court that ordered Martinez-Villareal to exhaust his claim in state court did so after AEDPA had come into effect.

> This may have been the second time that respondent had asked the federal courts to provide relief ... but this does not mean that there were two separate applications, the second of which was necessarily subject to [28 U.S.C.] § 2244 (b). ... Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

Martinez-Villareal, 118 S.Ct. at 1621.

The same is true here. Graham "was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." He did not receive that adjudication only because the Fifth Circuit has now subjected his petition to a legal regime that this Court has already held should not apply to cases in the posture of Graham's.

In fact, if there is any distinction between Graham's case and *Martinez-Villareal*, it is one that favors Graham. There was no link between Martinez-Villareal's unadjudicated claim (mental competency to be executed) and factual innocence, but the effect of this Court's ruling that AEDPA was inapplicable was to enable him to pursue the claim *ab initio* in federal court. Here, if Graham prevails in this Court, the threshold question for review on remand to the Fifth Circuit will be whether he is entitled to pursue his successive petition under the pre-AEDPA standard of *McCleskey v. Zant*, 499 U.S. at 493-95. That standard will require Graham to show that the constitutional violation in his case (ineffective assistance of counsel) led to the conviction of one who was probably innocent.

If the ruling below is allowed to stand, Graham -- who asserts that he was erroneously convicted because of his trial counsel's incompetent performance -- will be executed without any definitive federal resolution of those claims. Congress could perhaps mandate that result, but this Court has already held that it

did not. Several of the *amici* suffered years of unjust imprisonment because of their trial counsel's ineffectiveness. They know first-hand the almost insuperable practical obstacles to amassing sufficient resources to meet even this Court's *McCleskey* standard.[3] Together with the other *amici*, they urge the Court to enforce its ruling in *Martinez-Villareal* here, so as to uphold the protections the Court it has carefully crafted for those in their position.

B. Having Found No Plain Statement that Congress Intended AEDPA to Apply, the Fifth Circuit Erred in Applying AEDPA.

Having wrongly decided that AEDPA governed this case, the court below proceeded to examine whether Congress intended the statute to apply retroactively to situations like the one presented. It found nothing specific on point. As the Petition argues (Pet. at 22-23), this should have led the Fifth Circuit to

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[3]In all too many cases, the vindication of innocence has occurred only because Death Row inmates have been the fortunate beneficiaries of pro bono generosity. See *People v. Bull*, 705 N.E.2d 824, 847 (Ill. 1998) (Harrison, J., concurring and dissenting) (reviewing cases of nine wrongly convicted capital inmates in Illinois: "If these men dodged the executioner, it was only because of luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release."). Thus, for example, Randall Dale Adams was freed in Texas in 1989 as the result of the efforts of a documentary filmmaker; the vindication of Willie A. Brown in Florida in 1988 followed a re-investigation of his case by a prison activist who spent $70,000 of her own money on the cause; Sonia Jacobs was released from Death Row in Florida in 1992 because a childhood friend found out about the case and led an investigation after hearing of the execution of her co-defendant; and Verneal Jimerson and Dennis Williams were vindicated in Illinois as the result of the investigative efforts of journalism students supervised by Professor David Protess of Northwestern University. See Michael L. Radelet, William S. Lofquist & Hugo Adam Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907, 923, 930, 941, 944 (1996).

apply the plain statement rule of *Landgraf*, 511 U.S. at 280, and interpret the statute as inapplicable. See *Martin v. Michigan Dep't of Corrections*, 119 S.Ct. 1998, 2003 (1999).

Instead, the Court of Appeals hypothesized that Congress would have wanted AEDPA to apply to cut off Graham's claims because of its general intention to prevent delays. See *Graham v. Johnson*, 168 F. 3d 762, 779-89 (5th Cir. 1999). Quite apart from the fact that the plain-statement rule is designed exactly to prevent this sort of unguided speculation (*Martin*, 119 S.Ct. at 2005-06), the speculation itself is unconvincing.

Legally, it is a general rule of statutory construction that Congress is presumed to know and approve of existing decisional law unless it specifically states otherwise. See *Lorillard v. Pons*, 434 U.S. 575, 581-83 (1978). Prior to the enactment of AEDPA, the Circuits were uniform in not treating petitions filed under such circumstances as successive. See, *e.g.*, *Aiken v. Blodgett*, 921 F.2d 214 (9th Cir. 1990), cert. denied, 502 U.S. 839 (1992); *Grant v. Hoke*, 921 F.2d 28, 29 (2d Cir. 1990); *Mathis v. Zant*, 903 F.2d 1368 (11th Cir. 1990). Thus, quite apart from the *Landgraf* issue, the Fifth Circuit's reading of the statute is at odds with the ordinary presumptions concerning legislative intent.

Amici urge that, in the present circumstances, it makes sound practical sense to apply those presumptions, and to read Congressional silence as protecting, not destroying, pre-existing legal rights. If Congress had focused on the transitional problems that would be created by applying the successive-claim provisions of AEDPA to those in Graham's position, it almost surely would have explicitly made the new provisions inapplicable to those litigants, for precisely the reasons we urge here. Such people had necessarily arrived in federal court under a legal regime in which their rights to file successor petitions were governed by the miscarriage of justice rule of *McCleskey*, and it would be unfair to deprive them of an entitlement woven into the fabric of the prior

law. No matter how strongly Congress wanted to expedite executions when it enacted AEDPA, it is clear that it never intended to significantly enhance the risk of executing potentially innocent defendants who have never had a meaningful opportunity to have their effectively presented claim adjudicated in federal court.

C. Applying the Test of "Common Sense," the Fifth Circuit Should Have Rejected as Impermissibly Retroactive a Reading of AEDPA that Would Retrospectively Deprive Arguably Innocent Death Row Prisoners of the Right to Attack Counsel's Failure to Find the Evidence of Innocence.

After wrongly setting aside the rules of statutory construction mandated by this Court's cases, the Fifth Circuit decided that the application of AEDPA's new substantive standards respecting successor petitions[4] would not have an impermissible retroactive effect. As the Court of Appeals noted, this is ultimately a matter of judgment. See *Martin*, 119 S.Ct. at 2006 (inquiry "demands a common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment,'" quoting *Landgraf*, 511 U.S. at 270). We urge this Court to apply its judgment to the matter, with a view towards vindicating the views of the several Circuits that disagree with the Fifth.

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[4]As applicable to this case, those standards are the ones contained in 28 U.S.C. § 2244 (b) (1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed") and § 2244 (B)(i) (a claim not previously presented shall be dismissed unless "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.").

The reason is straightforward. As already indicated, Graham had a right to obtain a ruling on the merits of his constitutional claim solely upon a showing of a colorable claim of innocence -- a showing that the District Court assumed in 1993 he had succeeded in making. If AEDPA applies, then Graham will no longer be able to attack trial counsel's conduct in failing to collect and present the available evidence of innocence. That would surely (and probably fatally) deprive Graham of his right to be heard on the merits, a pre-existing legal right of considerable value -- as this case demonstrates, and as *amici* are most keenly aware.

But the Fifth Circuit held that reading AEDPA as requiring this result would not render it impermissibly retroactive because Graham could only succeed if he were able to demonstrate that he relied upon the prior law.[5] Because Graham had never had the right to file an unexhausted petition, the Court of Appeals said, he could not reasonably expect that he would later be entitled to the benefits of the law as it existed at the time of that improper filing. *Graham v. Johnson*, 168 F.3d at 786.

This reasoning is badly flawed. To begin with, it unfairly assumes the conclusion -- after all, the Circuit Court in 1996 dismissed the petition *sua sponte*. The court never gave Graham a chance to argue his entirely reasonable position that he had indeed sufficiently exhausted his state remedies (Question 3(B)). Then, in 1999, that same court arbitrarily refused to address the problem it had created (Questions 4-5).

Moreover, leaving to Graham's counsel the argument that the creation of a formalistic and inflexible "reasonable reliance" requirement is inconsistent with this Court's precedents (Question

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[5]*Martin* makes clear that such reliance is one factor to be taken into account. The question is whether the Fifth Circuit was correct in making it the determinative factor in the "common sense, functional judgment" it was supposed to be reaching.

3(A)), we wish to emphasize the practical realities of the situation facing innocent Death Row prisoners. There is good reason why outside the Fifth Circuit a petitioner need show no more than that a claim that he would otherwise be allowed to pursue will be dismissed.

The right to litigate defaulted legal claims on a colorable showing of actual innocence was part-and-parcel of -- and to some extent an amelioration of -- a system in which the quality of counsel available to capital defendants and death-sentenced inmates was at times inadequate. Counsel was all too often deficient in satisfying the expectation of *Powell v. Alabama*, 287 U.S. at 69, that legal representation would enable the innocent to escape mistaken convictions and death sentences.[6]

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[6]Arguably, the system has changed for the better in the past few years. First, this Court in *McFarland v. Scott*, 512 U.S. 849 (1994), reinvigorated 21 U.S.C. § 848, the statutory provision for appointment of federal habeas counsel in capital cases. By allowing the appointment of counsel upon the filing of a request for one (rather than on the filing of a formal habeas corpus petition) the ruling served to give capital defendants competent, compensated counsel to investigate their cases much earlier than had previously been the case. Then, in conjunction with its consideration of AEDPA, Congress turned back a proposal to weaken the provision. See Larry W. Yackle, *A Primer on the New Habeas Statute*, 44 BUFF. L. REV. 381, 393 n.42 (1996) ("The original bill in the Senate would have repealed the *right* to counsel in capital habeas cases .... On the floor however, Senator Biden persuaded Senator Hatch to accept an amendment that preserves the mandatory character of the counsel statute in death penalty cases. The new statute, then, leaves the right-to-counsel aspects of *McFarland v. Scott* ... intact.").

The new statutory restrictions contained in AEDPA thus exist within a legal environment significantly different from the one that existed at the time Graham and the *amici* were attempting to establish their innocence.

Such practitioners did not take or omit certain steps in reliance on existing law -- in far too many cases, they were utterly ignorant of the existing law.[7] Yet, under the ruling below, inmates who suffered from the very worst representation (precisely the ones the miscarriage of justice doctrine was designed to assist) are denied adjudication of their claims. According to the Fifth Circuit, these inmates are even barred from raising their claims of ineffective assistance of trial counsel -- because counsel's legal theories were "patently unreasonable," *Graham v. Johnson*, 168 F.3d at 787. In other words, some inmates who did not commit murder are to be executed instead for the crime of having been saddled with lawyers so ignorant that they managed to block even the safety valve this Court created to protect against that consequence. This is a perversion not just of law, but of justice.

D. To Prevent a Miscarriage of Justice the Fifth Circuit Should Have Recalled its 1996 Mandate.

Under the circumstances, the very least that the Fifth Circuit should have done was to recall the mandate it issued *sua sponte* in 1996 -- the unanticipated source of the legal barriers that have now arisen to prevent a capital prisoner from demonstrating his innocence. But the Fifth Circuit refused.

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[7]See, *e.g.*, *The Crisis in Capital Representation*, 51 REC. ASSOC. B. CITY N.Y. 169 (1996); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Stephen S. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923 (1994); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990) (ABA report on reforming the capital litigation system).

The Court of Appeals placed literalistic reliance on fact-specific language in *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489 (1998), distinguishing between *sua sponte* recalls of mandates and those following the request of a party. At the sanme time, the Court of Appeals conspicuously ign ed Graham's argument based on the proposition unanimously endorsed by the *Calderon* Court: a Court of Appeals behaves properly in recalling its mandate when "it acts to avoid a miscarriage of justice as defined in our habeas corpus jurisprudence." *Calderon*, 118 S.Ct. at 1502.

Of course, that is precisely what is at issue here. A "miscarriage of justice" occurs when "a constitutional violation," such as ineffective assistance of counsel, "has probably resulted in the conviction of one who is actually innocent," *Murray v. Carrier*, 477 U.S. at 496; accord *Schlup*, 513 U.S. at 326. The Fifth Circuit's summary refusal to even consider this issue was a legal error that, undermining the type of safeguards from which *amici* benefited, threatens to subject Graham to the ultimate miscarriage of justice.

Assuming that every other portion of the Fifth Circuit's decision was correct, it is all the more important for the Court to reverse this aspect of the ruling. For if the Courts of Appeals no longer retain discretion to hear gateway innocence claims (see *id.* at 315 n.30), by employing their "recognized ... inherent power to recall their mandates" (*Calderon*, 118 S.Ct. at 1498), then the "gateway" is illusory.

We who owe our lives to the contrary principle urge the Court to reaffirm its oft-repeated admonition that it will administer the federal habeas corpus regime in such a way as to implement "the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982). See also *Murray v. Carrier*, 477 U.S. at 495; *Schlup*, 513 U.S. at 320-21.

Unfortunately, it can take years for the evidence of a condemned inmate's innocence to come to light. In the case of Kirk Bloodsworth, for example, it was nine years after conviction that he was set free. Similarly, Clarence Lee Brandley worked to prove his innocence for eight years. Joseph Green Brown was in prison for 13 years before he was freed on federal habeas corpus. And Walter McMillian spent five years behind bars before he was exonerated. These histories, together with the histories of at least 77 other innocent men and women who have been wrongly condemned to die only to be later exonerated, confirm that the unthinkable can happen. Mistakes are inevitable in any human endeavor and the true measure of a legal system's justness is the extent to which it is committed to providing reasonable mechanisms for correcting those tragic errors. If the pain the individual *amici* have suffered — being locked up for years and condemned to die for crimes we did not commit – can help this Court recognize the critical need for providing such mechanisms to others, then at least their suffering will not have been completely in vain.

CONCLUSION

Understood in the context of a death penalty system still inching painfully toward reform, the ruling below is legally wrong and structurally counter-productive. It places one of the largest death penalty Circuits well outside the mainstream of the sound principles adopted elsewhere in the country, and is profoundly unfair to prisoners facing wrongful execution. As individuals who were once in that position ourselves, but had the good fortune to have the law applied fairly in our cases, *amici* urge this Court in the name of justice to grant the petition for certiorari in this case and reverse the decision below.

Respectfully submitted,

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